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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 342

SAM ARSTEIN and BEN ARSTEIN
Petitioners,

—against—

ROBERT REIS & COMPANY.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, NEW YORK COUNTY.

LLOYD B. KANTER,
H. N. ROTH,
PHILIP B. KURLAND,
For the Petitioners.

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ROBERT REIS & COMPANY.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, NEW YORK COUNTY.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners respectfully show:

Jurisdiction.

The order of the Appellate Division of the Supreme Court, First Judicial Department, affirming the judgment of the Supreme Court of the State of New York, County of New York, was entered on April 26, 1948. Judgment was entered on the order of the Appellate Division in the Supreme Court of New York County on April 28, 1948. Petitioners' application to the Court of Appeals of New York for leave to appeal was denied on July 16, 1948.

Jurisdiction of this Court is invoked under Title 28, § 1257(3) of the United States Code. Although the judgment sought to be reviewed is that entered in the New York Supreme Court after affirmance by the Appellate Division, the time within which to file this petition for certiorari runs from the date when the Court of Appeals denied leave to

appeal. *American Railway Express Co.* v. *Levee,* 263 U. S. 19, 21 (1923). Accordingly, the petition is timely filed.

Opinions Below.

The opinion of the Supreme Court, New York County (R. 2) is not officially reported. The notation of affirmance by the Appellate Division (R. 30) is reported at 273 App. Div. 963, 79 N. Y. S. 2d 314. The denial by the Court of Appeals of the motion for leave to appeal (R. 33) is reported at —— N. Y. ——.

Statutes Involved.

Section 36[E] of the New York Stock Corporation Law as amended by Laws of 1943, c. 600, provides:

> "A stock corporation may affect one or more of the following purposes: * * *
>
> "[E] To classify or reclassify any shares, whether with or without par value. The creation, alteration or abolition, in whole or in part, of designations, preferences, privileges or voting powers of any shares previously authorized, or the restrictions or qualifications thereof (including the creation, alteration or abolition of any provisions or rights in respect of (a) the redemption of any shares, or (b) any cumulative or non-cumulative dividends, whether or not accrued, which shall not have been declared, or (c) any accumulated but unexpended instalment of any sinking fund whether or not set aside for the redemption or purchase of any shares, or (d) any preemptive right to subscribe for shares or other securities of the corporation whether existing at law or contained in the certificate of incorporation or other certificate filed pursuant to law), shall be deemed to be a classification or reclassification of such shares for the purpose of this section * * *, if effected under this paragraph [E] * * *."

Statement.

The petitioners are the owners of 1150 shares of the "first preferred stock" of the respondent, Robert Reis & Co., a New York corporation (R. 5/2). At the time they acquired the stock, the respondent's corporate charter provided, *inter alia*, that:

> "The holders of the first preferred stock shall be entitled to receive cumulative dividends at the rate of seven per cent, per annum, and no more, payable quarter yearly. * * * The corporation shall be obligated to pay the same but only out of surplus or net profits of the corporation." (R. 6)

Though the charter provided for the declaration by the directors of dividends on the other classes of stock before payment was to be made,[1] no declaration was required as to the dividends on the first preferred stock. The obligation to pay the dividends on the said shares arose directly from the charter provisions just quoted.

The charter also provided that no dividends on the other corporate stock could be paid so long as accrued or current dividends on the first preferred stock remained unpaid. (R. 6) Priority in the event of dissolution was also conferred on the first preferred stock. (R. 9)

As of June 30, 1947, the accrued and unpaid dividends on the first preferred stock amounted to $159.25 per share or an aggregate on the class of $3,358,104.75. (R.)

On October 14, 1947, pursuant to a New York statute enacted in 1943 (N. Y. Stock Corporation Law § 36[E]), many years after the respondent's charter became effective, the respondent proposed an amendment of the corporate charter

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[1] *E.g.*, as to the common stock: "subject to the foregoing provisions and not otherwise, such dividends (payable either in cash, common stock, or otherwise) as may be determined by the Board of Directors, may be declared and paid on the common shares from time to time out of the remaining surplus or net profits of the corporation." (R. 8)

so as to eliminate the accrued dividends on the first preferred stock. (R. 24) On November 17, 1947, the holders of two-thirds of the stock of each class voted to amend the charter in accordance with the proposal of the respondent. (R. 24-5) Petitioners objected to the charter amendment and so notified the respondent. (R. 25)

Petitioners, in the instant case, sought a declaratory judgment from the Supreme Court of New York that the proposed amendment of the charter was without sanction in law. (R. 25) A motion was made by the petitioners for summary judgment on the grounds that (1) the New York statute was not applicable to the instant case and therefore no sanction in state law existed for the amendment to the charter; (2) if Section 36[E] of the New York Stock Corporation Law was applicable, it unconstitutionally impaired the petitioners' contract with the respondent and deprived the petitioners of their property without due process of law. The Supreme Court ruled that the complaint should be dismissed (R. 3), for the reasons that Section 36[E] was applicable and that a charter amendment, pursuant to that section, which eliminates accrued dividends did not infringe on the petitioners' constitutional rights under the Contract or Due Process Clauses of the United States Constitution. (R. 2-3) The Appellate Division affirmed without opinion (R. 30) and the Court of Appeals denied a motion for leave to appeal to that Court. (R. 33)

Questions Presented.

1. Whether a state statute authorizing an amendment of a corporate charter so as to destroy the rights of preferred stockholders to accumulated dividends impairs the rights of the non-assenting preferred stockholders in violation of the Contract Clause and of the Due Process Clause of the Fourteenth Amendment.

2. Whether a state statute authorizing an amendment of a corporate charter so as to destroy the rights of preferred

stockholders to accumulated dividends impairs the rights of the non-assenting preferred stockholders in violation of the Contract Clause and of the Due Process Clause of the Fourteenth Amendment, where by the terms of the charter the accrued dividends on the preferred stock are debts of the corporation.

Reasons for Granting the Writ.

1. Important questions of constitutional law are presented by this case.

(a) Prior to the enactment in 1943 of Section 36[E] of the New York Stock Corporation Law it was not possible to amend the charter so as to eliminate accumulated preferred stock dividends except by unanimous consent of all the stockholders. *Davison* v. *Parke, Austin & Lipscomb*, 285 N. Y. 500 (1941); *Roberts* v. *Roberts-Wicks Co.*, 184 N. Y. 257 (1906). The courts of New York recognized that petitioners' rights to the accrued dividends were "property rights founded upon contract." 285 N. Y. at 509. Nevertheless, by means of Section 36[E] this "pre-existing obligation [was] discharged on terms less advantageous to [the petitioners] than the terms on which alone it could have been discharged under the previous state of the law." Thus, "an issue is presented whether there is an unconstitutional impairment." Hale, *The Supreme Court and the Contract Clause* (1944) 57 Harv. L. Rev. 512, 518; *Coombes* v. *Getz*, 285 U. S. 434, 441 (1932).

(b) A dividend on preferred stock, once declared, is a debt of the corporation, and therefore, Section 36[E] is not and could not constitutionally be applicable to declared dividends on preferred stock. New York Stock Corporation Law, Section 36[E]; Burstein, *The Elimination of Accumulated Preferred Stock Dividends*, N. Y. L. J., October 27, 28, 29, 30, 31, 1947; *McNulty* v. *W. & J. Sloane*, 184 Misc. 835 (Sp. T. N. Y. Co., 1945). But the accrued dividends owing petitioners are

debts of respondent corporation even though not declared. The obligation to pay dividends on the type of preferred stock owned by petitioners arose directly from the terms of the charter and no declaration by the directors was required. The New York courts by a gross and obvious misinterpretation of the charter have made applicable Section 36[E]. That misinterpretation in itself raises a problem of due process under the Fourteenth Amendment. Moreover, in determining whether Section 36[E], if applicable, violates the Contract Clause of the federal Constitution, "the existence of the contract and the nature and extent of its obligation become federal questions for purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court." *Irving Trust Co.* v. *Day*, 314 U. S. 556, 561 (1942); *Coolidge* v. *Long*, 282 U. S. 582, 597 (1931); *United States Mortgage Co.* v. *Matthews*, 293 U. S. 232, 236 (1934); *Violet Trapping Co.* v. *Grace*, 297 U. S. 119, 120 (1936); *Schenebeck* v. *McCrary*, 298 U. S. 36, 37 (1936); *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, 167 (1933), and authorities cited *id.*, at n. 2.

2. Many of the important "incorporation states" have statutes the impact of which is similar to the New York statute here in question. And there is a conflict of authority among these states on the issue of whether they unconstitutionally impair the contract (the charter) between the preferred stockholder and the corporation.

The majority of the states which have decided the issue have declared unconstitutional the type of charter amendment approved by the New York court in this case. *Keller* v. *Wilson & Co., Inc.*, 21 Del. Ch. 391 (1936); *Lonsdale Securities Corp.* v. *International Mercantile Marine Corp.*, 101 N. J. Eq. 554 (1927); *Wheatley* v. *A. I. Root Co.*, 147 Ohio St. 127 (1946); *Patterson* v. *Durham Hosiery Mills*, 214 N. C. 806 (1939). In addition to New York, at least one other state would appear to have sanctioned the destruc-

tion of accrued dividends on preferred stock by amendment to the corporate charter. *McQuillen* v. *National Cash Register Co.*, 27 F. Supp. 639 (D. Md., 1939), aff'd 112 F. 2d 877 (C. C. A. 4, 1940) (constitutional questions not considered in opinion), cert. denied 311 U. S. 695 (1940). This conflict of authority on a constitutional issue can be resolved only by a decision of this Court.

3. The issues presented by this case are of major importance in the conduct of corporate affairs throughout the nation.

(a) Hundreds of millions of dollars are represented by accrued and unpaid dividends on cumulative preferred stocks. On preferred stocks of registered public utilities alone, in 1938, these arrearages amounted to $510,399,654. S.E.C., Dividend Status of Preferred Stocks of Registered Public Utility Holding Companies and Their Electric and Gas Utility Subsidiaries as of December 31, 1938 (1939) at p. 3. Whether these values may or may not be destroyed by charter amendment is dependent upon the resolution by this Court of the issues presented by this case.

(b) Perhaps as important as the issue of the destructibility of such vast amounts in accruals in past investment is whether cumulative preferred stock will continue to be used in our economy as a method of securing venture capital.[2] Clearly if such accumulation is to be subject to destruction by charter amendment, no prudent investor could be expected to purchase cumulative preferred stock. Perhaps they could still be sold to the unwary who retain the naive belief that corporate charters mean what they say. But it will take a decision of this Court to resolve the question whether cumu-

[2] A forceful argument against the use of preferred stock, unless the preferences are indestructible, is set forth by Judge (then Commissioner) Frank, in his dissenting opinion in The North American Company, 4 S.E.C. 434, at 462 *et seq.* (1939).

lative preferred stock is to remain a conservative investment of limited return or to be merely a speculative bubble.

The Federal Questions were Properly and Timely Raised.

Petitioners in their complaint did not allege any violation of their federal constitutional rights. They had no right to do so under New York practice. It was petitioners' position that they were entitled to an injunction for the reason that the proposed reclassification would have eliminated their accrued dividends.[3] It was for respondent to allege that the proposed reclassification was pursuant to Section 36[E] of the Stock Corporation Law, for under New York law the defendant must affirmatively claim statutory immunity for its acts. *Vail* v. *Railroad Company*, 147 N. Y. 377, 380 (1895); 3 Wait's New York Practice (1937) 520-521. Had petitioners stated in their complaint that Section 36[E] of the Stock Corporation Law, if applicable, was unconstitutional, they would have been anticipating a defense. In New York such anticipatory matter may be stricken as irrelevant and prejudicial. *Murphy* v. *National City Bank*, 203 App. Div. 571 (1st Dept., 1922).[4]

Nor did the petitioners have such an opportunity on filing their motion for judgment on the pleadings. The only papers which are part of the record upon such a motion are the notice (R. 4), the annexed complaint and the answer. (R. 5-28)

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[3] The theory behind petitioners' complaint was, of course, that Section 36[E] of the Stock Corporation Law was inapplicable. (See R. 25) Not until the New York Supreme Court had construed the Charter as coming within the scope of Section 36[E] did any constitutional questions arise as to the validity of that section.

[4] Although it would have been improper pleading for the petitioners to anticipate the defense of the statute in their complaint, they met such a defense in their brief in support of their motion for judgment on the pleadings and stated therein that the statute, if applicable, violated the Contract and Due Process Clauses. See Brief in Support of Motion for Judgment Pursuant to Section 476 of the Civil Practice Act and Rule 112 of the Rules of Civil Procedure, p. 2. The relevant excerpt is set forth in the Appendix. See also, note 3, *supra*.

There was, therefore, no possibility of the petitioners presenting their federal questions on the record made in the trial court. Nor was there such an opportunity in the appellate tribunals. On appeal to the Appellate Division of the First Department no bill of exceptions had to be filed; only a notice of appeal was necessary. (R. /) N. Y. Civil Practice Act § 616. The Appellate Division was informed of the points upon which the appellants relied by the appellants' brief filed in that court. *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 68 (1928); Rule VI of the Appellate Division, First Department.

When petitioners moved for leave to appeal to the Court of Appeals from the affirmance of the Appellate Division, again they were not required to file a bill of exceptions. Apart from certain formal documents such as a notice of motion for leave to appeal, an affidavit, a copy of the judgment from which the appeal is sought to be taken, a copy of the opinions in the case, the Court of Appeals sees no papers except the brief in support of the application and a copy of the record in the court below. See *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 68 (1928); Rule XXI of the Rules of the New York Court of Appeals.

Because the petitioners did not have any opportunity to state in the record the grounds upon which Section 36[E] of the Stock Corporation Law was violating the Federal Constitution, this Court, in order to determine whether their constitutional claims were properly raised, must look to the briefs which were filed in the Supreme Court, in the Appellate Division and in the Court of Appeals. *Stewart* v. *Kahn*, 11 Wall. 493, 494, 495, 499, 500-502 (1871); *Castillo* v. *McConnico*, 168 U. S. 674, 678-679 (1898); Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1936) 125-126. Those briefs, relevant excerpts of which are set forth in the Appendix, clearly presented the constitutional questions here urged. Brief for Plaintiffs-

Appellants filed in the Appellate Division, p. 13; Notice of Motion for Leave to Appeal to the Court of Appeals, pp. 9, 16.[5] Copies of the petitioners' briefs at each stage of this case have been deposited with the Clerk of this Court. All of these briefs are certified, with the exception of two briefs in the New York Supreme Court which under the practice of that Court are not filed documents and, therefore, may not be certified.

Nor are petitioners deprived of their federal questions by the fact that the affirmance by the Appellate Division of the judgment of the New York Supreme Court was without opinion. It cannot, of course, be known precisely what reasoning the Appellate Division followed; but the necessary effect of its affirmance is to permit the corporation to eliminate dividend accumulations on its preferred stock pursuant to Section 36[E] of the Stock Corporation Law and it is this result which petitioners contend may not be accomplished under state law in violation of the Impairment of Contract and Due Process clauses of the federal Constitution. *Cf. Kaukana Water Power Co.* v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254 (1891). A court cannot avoid having its judgment reviewed by this Court when a federal constitutional question is necessarily involved merely because it has not written an opinion. *Neilson* v. *Lagow*, 12 How. 98, 110 (1851); *Maguire* v. *Tyler*, 8 Wall. 650, 664-665 (1869); *Williams* v. *Kaiser*, 323 U. S. 471, 478 (1945).

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[5] In some instances the briefs state that the statutes, as construed, violates the Due Process and Contract Impairment clauses "of the constitution" without specifically indicating that it is the federal Constitution which is alleged to have been violated. But since the Constitution of the State of New York has no contract impairment clause, it is clear that the briefs meant the federal Constitution. See Appendix.

ARGUMENT.

Prior to 1943, New York Law Barred the Elimination of a Stockholder's Accrued Dividends on Cumulative Preferred Stock by Amendment of the Corporate Charter Without His Consent.

Before 1943, if a New York corporation's charter were to be amended so as to destroy accrued and unpaid dividends on cumulative preferred stock, it could be accomplished, apart from bankruptcy reorganization proceedings, only by means of "the squeeze play" as one authority called it [6] or "the recapitalization racket" as it was termed by another.[7] This method is most succinctly described as follows:

> "Because of inadequate protective provisions, common stockholders are in a position to coerce holders of cumulative stock (and have often done so) into yielding their rights to receive unpaid and accumulated preferred dividends, in certain circumstances."
>
> "Those circumstances are as follows: (a) Due to losses, the corporate capital has been impaired; (b) earnings, however, subsequently increase and are amply sufficient to cover current preferred dividends; but (c) the state law (or certificate of incorporation) forbids the payment of dividends under those conditions; while (d) the consent of the common stock is necessary in order to reduce the common capital so as to wipe out the impairment on the books of the company, thereby making it possible to pay dividends out of current earnings; and (e) the preferred stockholders are eager to receive their dividends currently." [8]

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[6] Commissioner (now Judge) Frank, dissenting in The North American Company, 4 S.E.C. 434, 477 (1939).

[7] Dodd, *Fair and Equitable Recapitalizations* (1942) 55 Harv. L. Rev. 780, 816.

[8] 4 S.E.C. at 466.

But unless it could secure the votes of all of the holders of the preferred stock, the corporation could not amend its charter so as to eliminate accrued preferred dividends. An attempt to do so was summarily frustrated by the New York Court of Appeals in *Davison* v. *Parke, Austin & Lipscomb,* 285 N. Y. 500 (1941); see also *Roberts* v. *Roberts-Wicks Co.,* 184 N. Y. 257 (1906).

Thus, Section 36[E] of the New York Stock Corporation Law, for the first time purported to authorize the destruction of a preferred stockholders' right to accrued dividends without his consent. It was by use of this statute that the petitioners' contract with the corporation was abrogated and their claims thereunder destroyed. And the amendment of the corporate charter must be considered the action of the legislature. "When the legislature authorizes a course of procedure whereby a charter may be acquired or amended, action in conformity thereto does not create the charter or make the amendment, but both come into existence through the operation of the statute. The amendment is the act of the legislature the same as the charter itself and neither has existence except as conferred by statute." *Lord* v. *Equitable Life Assurance Society,* 194 N. Y. 212, 238 (1909).

Petitioners' Dividends Accrued Under the Charter Were Not Defeasible by the Enactment of Section 36[E] of the Stock Corporation Law.

For some time the courts have measured the validity of an impairment of a contract by whether the "right" so affected was a "vested property right." See, *e.g., Coombes* v. *Getz,* 285 U. S. 434, 442 (1932). But no criteria, except by analogy to adjudicated cases, have existed for the measurement whether a "right" was "vested". In effect, the term was merely the statement of the conclusion in the premise. The accrued dividends here destroyed, however, were the fundamentals created by the contract between the corporation and the preferred stockholders.

(a) The essential element of the petitioner's contract with the respondent provided that the petitioner was to receive dividends prior to any distribution among other stockholders. And if at any time the dividends on the first preferred stock were not paid, no dividends could be paid to others until the arrears had been made up. By reason of the abrogation of the terms of this contract, petitioners must now share the corporate property available for dividends with those over whom they previously had priority and must surrender their claims to the back dividends which are never to be paid to them.

Whether the contractual rights so destroyed are to be termed "vested and absolute," as some courts have held,[9] or "fixed and vested," [10] or "property rights founded upon contract," [11] or by any other such appellation, it is evident that these rights form the essence of the contract. Without them cumulative preferred stock is a different security. These rights are the ones depended upon by those who buy the stock.[12]

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[9] *Wheatley* v. *A. I. Root Co.*, 147 Ohio St. 127, 141 (1946).

[10] *Keller* v. *Wilson & Co. Inc.*, 21 Del. Ch. 391, 411 (1936). "Applying then the law relative to cumulative preferred stock to the case at bar what is the situation at the arrival of the date fixed for the first payment of the preferred dividend? There is no legal fund (surplus or profits), in this going concern from which this preferred dividend can be paid. As against the common stockholders, however, the right to this dividend is fixed and vested but the payment must be postponed until there exists a fund from which payment can legally be made. * * * The dividend cannot be paid, but the claim exists and the dividend accrues and the amount accumulates awaiting the existence of a legal fund for its payment." *Penington* v. *Commonwealth Hotel Construction Corporation*, 17 Del. Ch. 394, 400-401 (1932).

[11] *Davison* v. *Parke, Austin & Lipscomb*, 285 N. Y. 500, 509 (1941).

[12] "Preferred like this is sold on the basis of the protective features of cumulative dividends; * * *" Commissioner (now Mr. Justice) Douglas, dissenting in International Paper & Power Company, 2 S.E.C. 274 at 283 (1937).

Commissioner Healy's opinion was even more emphatic: "it is difficult to observe without some concern the extent to which stockholders, in many companies, who in good faith believed they were paying their money for a genuinely preferred position, have, through reorganization of perfectly solvent companies, such as this, through the bargaining leverage of common stockholders, been euchered, cajoled, coerced, elbowed, and traded out of their legal rights. Although we must recognize that often, especially in failing enterprises, various changes in stockholders' rights and various concessions become necessary, nevertheless, it seems to me there should be an emphatic recognition that the terms of preference stated in preferred stock certificates mean what they say. If not, it should not be permitted that they be called 'preferred.'" *Id.* at 1024.

> "Preferred stock, of course, stands on an entirely different footing from the common. Presumably the provisions for accumulation is a persuasive factor in inducing preferred stockholders to invest. Except in the case of preferred stock entitled to participate in earnings in an agreed proportion with the common stock, the stated dividend rate represents the maximum annual return on preferred stock. Likewise in these cases the redemption price and the liquidating value of the preferred, which are usually set at specified sums, limit automatically the holder's ultimate realization on his investment and will also prevent appreciation in market value beyond a certain amount. On the other hand, the annual dividend on common stock and its appreciation in market value in boom times, are, of course, unrestricted by any limitations of this nature. An investor in preferred stock presumably sacrifices these opportunities for gain for the greater stability and security accorded him by the terms of his contract. Thus, if dividends must be foregone in time of depression, his is the right to receive these dividends before payments are made to holders of junior stock when the corporation again enjoys prosperity." [13]

It would seem clear that if a statute may retroactively authorize the destruction of the fundamental rights created by a contract, as the New York statute purports to do here, little if anything is left of the protection afforded by the Contract Clause. If any potency remains in the Contract Clause, the Court must rule that the New York statute as

[13] S.E.C., Report on Protective and Reorganization Committees, Part VII (1938) 109-110.

applied in this case was an unconstitutional exercise of state power.[14]

(b) For the purposes of argument, it has been assumed until now that the provisions of the respondent's charter are similar to those commonly found in charters dealing with dividends on cumulative preferred stock. And if, as it should, the Court decides that a charter may not be amended retroactively to destroy the rights to unpaid accrued dividends, it need not concern itself with the unique features of the respondent's charter.

These features necessitate the ruling that in this case the accrued dividends were not defeasible by amendment to the corporate charter. For, by the terms of the respondent's charter, these accrued dividends are debts of the corporation.

> "* * * The right of common stockholders is, for the most part, uniform as to corporations generally and depends on general statutes and court decisions. This is not true of preferred stock. Rights possessed by shareholders of the latter class are, as a rule, defined by specific provisions in articles of incorporation, by-laws, and stock certificates." [15]

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[14] *Cf.*, "The right of a holder of cumulative preferred stock, issued at a time when the law did not permit of the cancellation of accrued and unpaid dividends against the consent of the holders, to such dividends, is, and ought to be regarded as a substantial right. It may reasonably be supposed that one who invests his money in cumulative preferred stock relies largely upon the right to secure the stipulated dividends at some time. Speaking generally, the investor seeks certainty as against a speculative rise in price. The right to such dividends gives value to the stock, easily recognizable even during periods when the dividends are not paid. As the right is an inducement to buy, so oftentimes is it an inducement to retain. To say that cumulative dividends cannot be paid when there are no profits at hand from which to pay them is not to say that they do not accrue under the contract; and unless the corporate surplus and the financial condition of the corporation are such that it would be an abuse of discretion on the part of the management not to declare and pay a dividend on cumulative preferred stock, there seems to be no more reason to view the right of the shareholders as vested than in the case where no surplus exists at all, for in either situation the shareholder has no immediate assertable right, nor may he ever have such right." *Keller* v. *Wilson & Co. Inc.*, 21 Del. Ch. 391, at 411 (1936).

[15] Kehl, Corporate Dividends (1941) 181. See also *Strout* v. *Cross, Austin & Ireland Lumber Co.*, 283 N. Y. 406, 413-14 (1940); *Equitable Life Assurance Society* v. *Union Pacific R. R.*, 162 App. Div. 81 (1st Dept., 1914), aff'd 212 N. Y. 360 (1914); *Jones* v. *Van Heusen Charles Co.*, 230 App. Div. 694 (3rd Dept., 1930).

The interpretation of respondent's charter is to be decided by this Court as an original question. For "the existence of the contract and the nature and extent of its obligation become federal questions for purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court." [16]

The contract between the corporation and the first preferred stockholders contained in such charter is an unusual one. It provides:

> "* * * The corporation shall be obligated to pay the same [the dividend] but only out of the surplus or net profits of the corporation. * * *" (R. 6)

Thus, except for the indefiniteness of the time of payment of the accumulated dividends, the obligation to pay them is just as definitely expressed as though it were to pay interest. Unlike the typical charter provision,[17] the obligation to pay the dividend is provided for by the charter, without requiring the declaration of a dividend by the directors. It is "so drawn as to entitle a preferred stockholder to the payment of interest or dividends immediately out of the first profits made by the corporation." *Hastings* v. *International Paper Co.*, 187 App. Div. 404, 414 (1st Dept., 1919). "This places the question of their rights beyond the discretion of the di-

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[16] *Irving Trust Co.* v. *Day*, 314 U. S. 556, 561 (1942); *Coolidge* v. *Long*, 282 U. S. 582, 597 (1931); *United States Mortgage Co.* v. *Matthews*, 293 U. S. 232, 236 (1934); *Violet Trapping Co.* v. *Grace*, 297 U. S. 119, 120 (1936); *Schenebeck* v. *McCrary*, 298 U. S. 36, 37 (1936).

[17] The common form of charter provision is set out in Meck, *Accrued Dividends on Cumulative Preferred Stock: The Legal Doctrine* (1941) 55 Harv. L. Rev. 71, 75:

"The holders of the Preferred Stock shall be entitled to receive from surplus and/or net profits of the corporation *when and as declared by the Board of Directors*, fixed cumulative dividends at the rate of Four Dollars ($4) per share per annum payable quarterly on the first days of January, April, July, and October in each year and said fixed cumulative dividends upon the Preferred Stock shall be paid or set apart before any dividend shall be paid or set apart on the common stock." (Emphasis added.) It is of interest to note that the new charter of the respondent, proposed before the objections were stated by the petitioners, abandons the compulsory dividend requirements of the old charter and requires a declaration by the directors. (R. 12)

rectors and gives the preferred stockholders a right to these profits as dividends * * *." *Wood* v. *Lary*, 47 Hun (N. Y.) 550, 557 (1890), aff'd 124 N. Y. 89 (1891). "Therefore, the right of the stockholders to these profits became fixed, and even if the directors made no division thereof, that right still existed and could not be taken away." *Ibid.*[18]

Thus, by the terms of respondent's charter, the status of the accrued dividends is the same as declared dividends to be paid sometime in the future on the happening of a specified event.[19] As the equivalent of declared but unpaid dividends, they are debts.[20]

By the very terms of the statute, dividends which had accrued and were declared were not subject to elimination by amendment to the corporate charter. N. Y. Stock Corporation Law, § 36[E]. It was recognized that such accrued dividends were debts and could not constitutionally be eliminated by charter amendment. *McNulty* v. *W. & J. Sloane*, 184 Misc. 835 (Sp. T. N. Y. Co., 1945).[21] Thus, the application of the statute to the facts presented in this case purported to do something that the state recognized it could not do, *viz.*, eliminate corporate debts by charter amendment. *Coombes* v. *Getz*, 285 U. S. 434 (1931).

---

[18] See also *Burk* v. *Ottawa Gas & Electric Co.*, 87 Kan. 6 (1912); 12 Fletcher, Cyclopedia of Corporations (Perm. Ed. 1931) 186; Stevens, Corporations (1936) 416.

[19] *First National Bank & Trust Co.* v. *Glenn*, 36 F. Supp. 552 (W. D. Ky. 1941); *Hill* v. *Newichawanick Co.*, 48 How. Pr. (N. Y.) 427 (1874), aff'd 8 Hun (N. Y. 459 (1876), aff'd 71 N. Y. 593 (1877); *Billingham* v. *Gleason Mfg. Co.*, 101 App. Div. 476 (1st Dept., 1905), aff'd 185 N. Y. 571 (1906); *Beers* v. *Bridgeport Spring Co.*, 42 Conn. 17 (1875); *Northwestern Marble & Tile Co.* v. *Carlson*, 116 Minn. 438 (1912); *Atwood* v. *Huff*, 130 Va. 624 (1921).

[20] *Cf.* Mr. Justice Bradley in *Branch* v. *Jesup*, 106 U. S. 468, 475 (1883): "Their stock is preferred stock, it is true, entitling them to interest on its face before any dividends can be made to the common stockholders. But this is not inconsistent with its being stock. It is a very common thing in this country to issue stock of this kind. The interest accruing thereon is in the nature of a preferred dividend, and is sometimes so called. Though after it has accrued it may become a debt; so also does a dividend become a debt after it has been declared and has become payable."

See also *Ford* v. *Snook*, 205 App. Div. 194 (4th Dept., 1923), aff'd 240 N. Y. 624 (1925); *Searles* v. *Gebbie*, 115 App. Div. 778 (4th Dept., 1906), aff'd 190 N. Y. 533 (1907); *Jaques* v. *White Knob Copper & Development Co.*, 260 App. Div. 640 (1st Dept., 1940).

[21] This is the decision relied upon as precedent by the trial court in this case.

The Reserve Clause of the State Constitution Does Not Afford a Basis for the Impairment of the Petitioners' Contracts.

This Court has recognized that the "authority of a state under the so-called reserved power is wide: but it is not unlimited. The corporate charter may be repealed or amended, and, within the limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." *Coombes* v. *Getz*, 285 U. S. 434, 441-42 (1932). This restriction had heretofore been recognized by the New York courts. *Breslav* v. *New York & Queens Electric Light & Power Co.*, 249 App. Div. 181 (2nd Dept., 1936), aff'd 273 N. Y. 593 (1937).

For the reasons stated above, it is clear that the application of Section 36[E] to the facts of this case clearly transcends the limits of the reserve power.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its jurisdiction by writ of certiorari.

Respectfully submitted,

LLOYD B. KANTER,
H. N. ROTH,
PHILIP B. KURLAND.

October, 1948.

APPENDIX.

Excerpts from Briefs Filed by Petitioners in New York State Courts.

Brief in Support of Motion for Injunction Pendente Lite, filed in the Supreme Court, New York County. Excerpt from page 3.

> "Plaintiffs maintain that the language of the underscored sentence creates the indebtedness which gives to the holders of the shares a property right to receive such dividends which is protected against destruction by the Constitution of the United States; that Section 36 was not intended to authorize a change which affects such vested rights; and, if it were so intended, the section contravenes the Constitution by impairing the obligation of contract and depriving the holders of their property without due process of law."

Brief in Support of Motion for Judgment Pursuant to Section 476 of the Rules of Civil Practice, used in the Supreme Court, New York County. Excerpt from page 2.

> "The case is to be decided on one or two propositions of law, each of which deals with Section 36 of the Stock Corporation Law. The first is whether that section, as amended by Chapter 600 of the Laws of 1943, was intended to apply to a change of defendant's First Preferred Stock so as to deprive plaintiffs of the right to receive accumulated dividends of more than $160.00 per share. The second question arises only if the first be answered in the affirmative and is whether the section violates the constitutional provisions against impairment of the obligation of contracts and the taking of property without due process of law in respect of plaintiffs' shares of stock."

Brief for Plaintiffs-Appellants, Supreme Court of the State of New York, Appellate Division, First Department. Excerpt from page 13.

> **"Unless the 1943 amendment be construed to be inapplicable to a change so as to eliminate the accumulated dividends on defendant's First Preferred stock, such amendment contravenes the 'due process' and 'contract impairment' clauses of the constitution in respect of the rights of the holders of such stock."**

Notice of Motion for Leave to Appeal to the Court of Appeals and Affidavit and Brief in Support Thereof. Excerpt from page 9.

> **"Legal Question to be Decided on the Proposed Appeal.**
>
> **"The principal question to be decided on the proposed appeal is *whether the charter provision gives the preferred stockholders the status of creditors as to the accumulated dividends.***
>
> **"If such principal question be answered in the affirmative, the court will be called upon to decide *whether Section 36 of the Stock Corporation Law, as amended, is applicable to a reclassification which has for its purpose the elimination of debts of the corporation represented by the accumulated dividends.***
>
> **"The third question to be presented is *whether, if the first and second be answered in the affirmative, said Section 36 violates the constitution as impairing a contract obligation or denying due process of law."***

Notice of Motion for Leave to Appeal to the Court of Appeals and Affidavit and Brief in Support Thereof. Excerpt from page 16.

"Unless the amended Section 36 be inapplicable to the abolition of accumulated dividends which are corporate debts, it contravenes the 'due process' and 'contract impairment' clauses of the federal constitution."

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 342

SAM ARSTEIN and BEN ARSTEIN,
Petitioners,

—against—

ROBERT REIS & COMPANY,
Respondent.

PETITIONERS' REPLY MEMORANDUM.

Each of the points made by the respondent in its answering brief is adequately covered by petitioners' main brief. Only two of respondent's contentions call for rejoinder: that petitioners should have appealed to the Court of Appeals as of right and that the petitioners have acquiesced in the constitutionality of the statute.

1. Section 588(1) of the Civil Practice Act provides that an appeal may be taken as of right from a decision of the Appellate Division only when there is "directly involved the construction of the constitution of the state or of the United States." This has been construed by the New York Court of Appeals to mean "not only directly but necessarily involved in the decision of the case." *Matter of Haydorn* v. *Carroll*, 225 N. Y. 84, 88 (1918); *People ex rel Lynch* v. *State Tax Commission*, 261 N. Y. 1, 4 (1933). As this case was presented to the Court of Appeals, that Court was called upon to decide whether the statute was applicable. Only if it were so decided, would the question of the constitutionality of the statute have arisen. Hence the case was one which did not

directly and necessarily involve the issue of constitutionality. For this reason, no appeal as of right could have been taken to the New York Court of Appeals.

Petitioners' position is substantiated by the fact that the New York Court of Appeals, when denying a motion for leave to appeal because an appeal of right lies, so states in its decisions. See cases cited by respondent at page 6 of its brief: *Jongebloed* v. *Erie Railroad Co.*, 296 N. Y. 994 (1947); *Estin* v. *Estin*, 296 N. Y. 308, 311-312 (1947); *Ibid* 296 N. Y. 828; *Albano* v. *Hammond*, 267 N. Y. 590 (1935). No such statement appears in the denial by the Court of Appeals of leave to appeal in this case.

2. Respondent seems to contend that petitioners, by not attacking *McNulty* v. *W. & J. Sloane*, 184 Misc. 835 (Sp. T. N. Y. Co., 1945), have in some way waived the questions presented to this Court. As the appendix to the petition demonstrates, these questions were expressly reserved in the state courts.

Respectfully submitted,

LLOYD B. KANTER,
H. N. ROTH,
PHILIP B. KURLAND,
For the Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 342

SAM ARSTEIN AND BEN ARSTEIN
Petitioners

against

ROBERT REIS & COMPANY
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 342

SAM ARSTEIN AND BEN ARSTEIN
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against

ROBERT REIS & COMPANY
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Reports of Opinions Below

Arstein v. *Robert Reis & Co.*, 77 N. Y. S. 2d 303; aff'd 273 App. Div. 963; leave to appeal denied 298 N. Y. —— (Advance Sheet No. 487).

Statement as to Lack of Jurisdiction

Petitioners say they invoke the jurisdiction of this Court under §1257(3) of Title 28 of the U. S. Code. That section, however, cannot sustain jurisdiction in this case, because:

A. No federal question was raised in the New York State courts.

B. No federal question was decided by the New York State courts.

C. The judgment now sought to be reviewed was not rendered by the highest court of the State of New York in which a decision could be had.

D. More than 90 days elasped between the entry of the judgment sought to be reviewed and the application to this Court for a writ of certiorari.

The foregoing jurisdictional questions will be dealt with under Point I of our argument, *post*, pp. 4-9. The merits of the case will be discussed briefly under Point II, *post*, pp. 10-11.

Statement of the Case

In November, 1947, Robert Reis & Company, a New York corporation, changed and reclassified its shares pursuant to §36 of the New York Stock Corporation Law* (R. 5, 12, 24-25). Thereby, there were eliminated substantial amounts of accrued, undeclared and unpaid cumulative dividends on the Company's previously outstanding First Preferred Stock (R. 6, 24).

Petitioners (plaintiffs below), as alleged holders of First Preferred Stock (R. 12; Cf. R. 25), objected that the recapitalization plan was "without legal sanction," and they sued for a declaratory judgment that the Company

*The pertinent provisions of §36 of the Stock Corporation Law are quoted at page 2 of the Petition for Writ of Certiorari.

had no "legal right to change and reclassify its capital stock in the manner contemplated" (R. 25). Specifically, petitioners complained of the elimination of the First Preferred dividend arrearages.

By order entered January 10, 1948 (R. 2-3) and judgment entered January 22, 1948 (R. 3-4), the New York Supreme Court, New York County, dismissed the complaint. Such determination was based upon the court's construction of certain provisions in the charter of the Company, before its recapitalization, and upon "the comprehensive opinion" in *McNulty* v. *W. & J. Sloane,* 184 Misc. 835 (R. 2-3).

The order and judgment of the New York County Supreme Court were unanimously affirmed on April 26, 1948, by the Appellate Division, First Department (R. 30), and judgment of affirmance was entered accordingly on April 28, 1948 (R. 33-34).

Petitioners took no appeal as of right to the Court of Appeals, the highest court of New York, on the ground that a constitutional question was involved (N. Y. Civil Practice Act, §588-1(a)). Instead, petitioners applied for leave to appeal on the theory that no appeal as of right existed (R. 30-32; Civil Practice Act, §589-2). The Court of Appeals denied such application on July 16, 1948 (R. 33, 34-35).

Argument

POINT I

This Court lacks jurisdiction to grant certiorari in this case.

A

No federal question was raised in the New York State courts.

While the complaint herein expressly alleged that the recapitalization of Robert Reis & Co. was pursuant to §36 of the New York Stock Corporation Law (R. 12), the constitutionality of that statute was in no way challenged. Indeed, petitioners are forced to admit that their complaint failed to allege any violation of their federal constitutional rights (Petition, p. 8). In view of this state of the pleadings, petitioners were not even in a position to contest the recapitalization on constitutional grounds (16 C.J.S. Constitutional Law §96).

Petitioners' unique contention that a New York plaintiff who disputes the constitutionality of a statute is precluded from so pleading (Petition, p. 8), is, of course, sheer nonsense. (See, *e. g.*: *Pratter* v. *Lascoff*, 140 Misc. 211; aff'd 236 App. Div. 713; aff'd 261 N. Y. 509).

Petitioners' further contention that they saved the constitutional point by arguing it in their briefs (Pet. pp. 9-10, 19-21) is equally untenable. In the first place, briefs filed in state courts form no part of the record here, and such briefs may not be used to establish that a federal question was raised below (*Lynch* v. *New York*, 293 U. S. 52, 54; *Live Oak Assn.* v. *R. R. Comm.*, 269 U. S. 354, 357-359; *Harding* v. *Illinois*, 196 U. S. 78, 84; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308; *Zadig* v. *Baldwin*, 166 U. S. 485, 488).

In the second place, all the briefs filed by petitioners in the courts below repeatedly and specifically conceded that the leading case in New York upholding the constitutionality of §36[E] of the Stock Corporation Law (*McNulty* v. *W. & J. Sloane,* 184 Misc. 835) was unquestionably correct. Thus, in their two briefs filed in the New York Supreme Court (on motion for preliminary injunction, p. 5; on motion for judgment, p. 7) petitioners agreed that Justice SHIENTAG's opinion in the *McNulty* case contained "the most detailed and scholarly disquisition of the whole problem in the decisions or learned articles." And in their brief in the Appellate Division, petitioners made the following concessions:

> "The soundness of the decision in the *McNulty* case is not questioned." (p. 6)
>
> "As already stated, appellants are not at all critical of Justice Shientag's opinion." (p. 10)
>
> "* * * of course, if the charter provision in the instant case were of the same character as in the *McNulty* case, there would be no basis for this lawsuit." (p. 11)

And in their brief seeking leave to appeal to the Court of Appeals, petitioners further admitted (p. 14):

> "Plaintiffs do not challenge Justice Shientag's opinion. It is, undoubtedly, sound."

Finally, the record made by petitioners themselves on their application for leave to appeal to the Court of Appeals removes any doubt that could remain as to whether a federal constitutional question was presented below. The New York Civil Practice Act provides alternative methods for obtaining review by the Court of Appeals. So far as pertinent to the situation at bar, the Civil Practice Act provides:

"§588. **Appeal as of right.** Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division * * * provided further that (a) there be directly involved the construction of the constitution * * * of the United States * * *."

"§589. **Appeal by permission.** Appeal to the court of appeals by permission lies only

* * *

2. * * * (b) by permission of the court of appeals upon application made directly to that court, from a judgment or order of the appellate division * * * which is not appealable as of right only because it does not comply with provision (a) * * * of subdivision one of section five hundred and eighty-eight of this act."

These alternative procedures for bringing a case before the Court of Appeals are mutually exclusive. Thus, if an appeal lies of right on constitutional grounds, leave to appeal will be denied (*Jongebloed* v. *Erie Railroad Co.*, 296 N. Y. 994; *Estin* v. *Estin*, 296 N. Y. 308, 311-312; 296 N. Y. 828; *Albano* v. *Hammon*, 267 N. Y. 590). And, conversely, if an appeal is taken without leave in a case which does not directly involve a constitutional question, such appeal will be dismissed (*Matter of Jones*, 264 N. Y. 401; *People ex rel. Ryan* v. *Lynch*, 262 N. Y. 1, 4; *Matter of Levy*, 255 N. Y. 223, 224-226). In the case at bar, petitioners elected not to appeal as of right, but to seek leave to appeal. In so doing, moreover, their attorney represented under oath that:

"An appeal to this Court [the Court of Appeals] from the order of affirmance does *not* lie as of right." (R. 32)

Here, then, we have the sworn statement of petitioners' own counsel that no federal constitutional question was directly involved herein.

B

No federal question was decided by the New York State courts.

The entire controversy below centered about the interpretation to be placed on certain language formerly appearing in the charter of Robert Reis & Co. Petitioners contended that the language employed at one spot transformed the cumulative dividends payable on the Company's First Preferred Stock into "debts" which automatically ripened into "vested rights" upon accrual, without the necessity for any declaration of such dividends by the Board of Directors. The Company took the opposite position: that the old charter, when read in its entirety, simply provided for the usual sort of cumulative preferred dividends which could not become "debts" unless and until they were declared. The New York courts resolved this question in favor of the Company. Justice Botein's opinion—the only one written in the case—held as follows (R. 2-3):

> "The dividends in this case have not been declared, but have accrued by mere passage of time and the relationship of debtor and creditor has not arisen in connection therewith. A reading of the submitted charter provisions indicated that a declaration of dividends was required to establish a debtor-creditor status; not, as contended, that it was created whenever dividends accrued, regardless of action by the directors. Plaintiffs seek to distill out of the language in the old charter which they stress an obligation on the part of the corporation to pay dividends which is more in the character of a commitment to pay interest on bonds. Even were such a provision enforceable, it cannot be fairly read into the charter contract between stock-

holders and corporation; particularly in the light of other charter provisions expressly stipulating for the declaration of dividends on the preferred stock. The attempted distinction of the *McNulty* case on this ground must therefore fail."

Thus, all that was passed upon in the courts below was the construction of certain provisions in a corporate charter. Not only was no federal constitutional question presented, but no such question was decided. It follows that this Court is without jurisdiction to review (28 U. S. C. A. §344, Note 49).

C

The judgment now sought to be reviewed was not rendered by the highest court of the State of New York in which a decision could be had.

Assuming *arguendo* that a federal constitutional question was raised below, petitioners failed to have it decided "by the highest court of a State [the Court of Appeals] in which a decision could be had" (U. S. Code, Title 28, §1257). As previously pointed out (*ante*, p. 6) petitioners took no appeal to the Court of Appeals as of right —as they might have done if a federal constitutional question had been involved. This court, therefore, is precluded from taking jurisdiction (*Southern Electric Co.* v. *Stoddard*, 269 U. S. 186).

D

More than 90 days elapsed between the entry of the judgment sought to be reviewed and the application to this Court for a writ of certiorari.

The judgment here sought to be reviewed is that of the New York Supreme Court (R. 3-4), as affirmed by the Appellate Division order of April 26, 1948 (R. 30) and judgment entered April 28, 1948 (R. 33-34).

The present application for a writ of certiorari was not filed until October 7, 1948—162 days after the Appellate Division's judgment of affirmance was entered. But §2101(c) of Title 28 of the U. S. Code requires that application for certiorari be made "within ninety days after the entry of such judgment." The instant application, accordingly, was not made in due time, and the jurisdiction of this Court cannot now be invoked (*Dept. of Banking* v. *Pink*, 317 U. S. 264; rearg. den. 318 U. S. 802; *Matton Co.* v. *Murphy*, 319 U. S. 412).

The fact that petitioners made an abortive application to the Court of Appeals for leave to appeal, and that such application was denied within the 90-day period, is entirely immaterial. The Court of Appeals' denial of leave to appeal did not in any sense constitute an affirmance of the judgment of the Appellate Division (*Matter of Marchant* v. *Mead-Morrison M. Co.*, 252 N. Y. 284, 297-298). Moreover, as already shown (*ante*, p. 6), if this case really did present a federal constitutional question, petitioners should have appealed to the Court of Appeals as a matter of right under §588 of the Civil Practice Act. Instead, petitioners made a perfectly useless motion under §589. Surely, by adopting the wrong procedure in the court below, petitioners could not extend the time allowed them by statute for applying for certiorari in this Court.

POINT II

In any event, the judgment below is clearly correct.

A sentence in former paragraph (a) of the charter of Robert Reis & Co. provided that the Company should be "obligated to pay" preferred dividends "but only out of the surplus or net profits of the corporation" (R. 6). Seizing upon the single word "obligated" in this particular sentence, petitioners advanced the feeble argument that such dividends had become "debts" immediately upon accrual, regardless of whether or not they had been declared by the Board of Directors. The trouble with such argument was that it ran directly counter to other explicit provisions in paragraphs (b), (e) and (f) of the old charter, which expressly required that preferred dividends be declared in the usual way* (R. 7, 8).

It was manifest to the courts below, therefore, that the preferred stock arrearages involved in this case were not "debts" at all, but just what they purported to be—undeclared and unpaid cumulative preferred dividends. That being so, it was equally manifest that such arrearages could lawfully be eliminated through a reclassification of shares in the manner permitted by §36 of the New York Stock Corporation Law. The constitutionality of §36 had been fully upheld in Justice SHIENTAG's scholarly opinion in *McNulty* v. *W. & J. Sloane*, 184 Misc. 835, which the New York Court of Appeals had cited with approval (*Anderson* v. *International Minerals & Chemical Corp.*, 295 N. Y. 343,

*The statement at page 3 of the Petition for Writ of Certiorari that "no declaration was required as to the dividends on the first preferred stock" is a false statement. Clause (1) of paragraph (e) of the old charter expressly referred to the requirement that First Preferred dividends be "paid or *declared*" (R. 8).

351). These petitioners were not challenging the authority of the *McNulty* case, but, on the contrary, were extolling it and conceding its soundness. Accordingly, since the charter provisions involved in this case were clearly of the same character as those considered in the *McNulty* case, the courts below had no alternative but to accept petitioners' invitation in their Appellate Division brief (p. 11) to hold that there was "no basis for this lawsuit."

CONCLUSION

The petition herein for a writ of certiorari should be dismissed; or, if not dismissed, denied.

Respectfully submitted,

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